Supreme Court of the United States

October Term, 1973

No. 72-1180

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Appellants,

v.

HENRY M. AUSTIN, L. D. BROWN, AND ROY P. ZIEGENGEIST,
Appellees.

ON APPEAL FROM A JUDGEMENT OF THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus,* in support of the appellants' position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 113 national and international unions having a total membership of approximately 13,500,000 working men and women.

Organizing the unorganized is the lifeblood of the trade union movement. And, as this Court has recognized:

> "representation campaigns are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 58.

The instant case involves a defamation judgment of $165,000[1] in favor of three individuals, who proved no pecuniary losses and little, if any, intangible harm, assessed because a local union, during an organizing effort, accurately characterized those individuals as "scabs" in the local's newsletter, and embellished that characterization with an uncomplimentary description of "what a scab is," attributed to Jack London. J.S. 1a-4a. Since organizing campaigns "are ordinarily heated affairs" and the use of "epithets such as 'scab' * * * are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7 [of the NLRA]" (*Linn*, 383 U.S. at 58, 61-62), this enormous, and so far as we are aware unprecedented, judgment obviously undermines the "principle that debate * * * should be uninhibited, robust, and wide open," which this Court has stated "weigh[s] heavily" in the present context (*id.* at 62-63). It is for this

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[1] A sum equal to approximately seven times the total annual revenue of the local union which published the alleged defamation and over twenty-three times the annual dues paid by the local's members to the national union also sued. J.S. 21-22.

reason that the AFL-CIO wishes to present its views to the Court.

ARGUMENT

THE DEFAMATION JUDGMENT AGAINST THE DEFENDANT UNIONS MAY NOT STAND SINCE THE STATEMENTS UPON WHICH IT IS BASED ARE NOT ACTIONABLE UNDER THE GOVERNING FEDERAL STANDARD ENUNCIATED IN *LINN V. PLANT GUARD WORKERS*, 383 U.S. 53.

1. **(a)** In support of an effort to organize non-members of the bargaining unit of which it was the majority representative, Old Dominion Branch No. 496 of the National Association of Letter Carriers, AFL-CIO, published the non-members' names under the heading "List of Scabs" in the Branch's monthly newsletter. And in the June, 1970, issue, the newsletter also carried the colorful rhetoric, attributed to Jack London, describing a scab, *inter alia*, as a "two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue." The newsletter was sent to the Branch's members and posted on a bulletin board at a post office station (there is no evidence that anyone other than a letter carrier saw it there). J.S. 1a-3a. Three of the non-members whose names were listed sued the Unions in the state courts under Virginia's insulting words statute, Virginia Code § 8-630. After proceedings in which the Unions preserved their federal defenses, including those based on federal labor law, and in which the plaintiffs proved no pecuniary losses and made only the most minimal showing of less tangible injury (such as mental suffering), the Supreme Court of Virginia affirmed

a judgment of $10,000 compensatory damages and $45,000 punitive damages for each plaintiff. J.S. 1a, 3a-4a, 6a-8a, 11a.

(b) In *Linn* v. *Plant Guard Workers,* 383 U.S. 53, this Court announced three propositions of the federal law governing state actions for defamation growing out of a union campaign to organize workers as to which the protections of § 7 of the National Labor Relations Act apply.[2] First, that the exclusive primary jurisdiction principle of *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, does not oust the state courts' jurisdiction to entertain such suits. *Linn,* 383 U.S. at 59-61. Second, that, since federal law establishes that "epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in [organizational] struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute" (*id.* at 60-61), the substantive law the states may apply in exercising that jurisdiction is "limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false" (*id.* at 61).[3] Third, the Court

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[2] In the instant case the source of the federal right to organize was not § 7 of the NLRA, but a parallel provision—§ 1 of Executive Order 11491 (J.S. 12a-13a). The court below recognized that the Executive Order "is essentially equivalent in both content and purpose to the National Labor Relations Act, * * * and 'is to be accorded the force and effect given the statute enacted by Congress.' *Farkas* v. *Texas Instruments, Inc.,* 375 F.2d 629, 632 (C.A.5), *cert. den.* 389 U.S. 977." J.S. 6a & n. 1.

[3] While less frequently utilized to vindicate paramount federal labor policy than the *Garmon* rule, this Court's decisions also establish the principle (relied upon in the portion of *Linn* noted above) that where the state courts do have jurisdiction, they may

prescribed certain rules for measuring damages where the plaintiff has met this standard for proving liability. *Id.* at 65-66 (see also n. 4 *infra*).

The court below acknowledged the controlling authority of *Linn* for the instant case insofar as that decision is protective of state jurisdiction. Its holding that federal law "has not preempted the state court from exercising jurisdiction in these cases" is squarely and properly based on *Linn*. J.S. 6a-7a. And its determination as to whether the damages awarded were excessive is centered on a lengthy (albeit highly selective)[4] quotation from *Linn* which the state court read as "set[ting] out the items of damages that may be considered by a jury." J.S. 11a.[5]

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not apply state substantive law to "forbid the exercise of rights explicitly protected by § 7" without contravening the Supremacy Clause. *Bus Employees* v. *Missouri*, 374 U.S. 74, 82; see also e.g. *Hill* v. *Florida*, 325 U.S. 538; *Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62; *Teamsters Union* v. *Oliver*, 358 U.S. 283; *Nash* v. *Florida Industrial Commission*, 389 U.S. 235.

[4] The court below began its quotation with the portion of the *Linn* opinion immediately following this Court's statement: "[E]ven in those jurisdictions * * * where certain language characteristics of labor disputes may be held actionable per se * * * the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle." 383 U.S. at 65. And within the quotation the three asterisks elided the sentences: "The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that [the] rule [requiring proof of severe harm] be followed. If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial." *Id.* at 65-66.

[5] The judgments entered below are, all else aside, grossly disproportionate to the plaintiffs injury and mulct the defendants for

But the state courts refused to follow *Linn* insofar as that decision limited the scope of the Virginia substantive law of libel. In face of this Court's holding that in cases such as this:

> "The standards enunciated in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), are adopted by analogy • • • to permit recovery of damages in a state cause of action *only* for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false [in order to] guard against abuse of [the] libel action, and [the] unwarranted intrusion upon free discussion envisioned by [federal law]" (*Linn*, 383 U.S. at 65; emphasis supplied)

the court below held:

> "that *New York Times* • • • [is] not applicable in the cases at bar • • • [and] that the federal rule as to • • • [the] knowing-or-reckless-falsity standard enunciated in *New York Times* is not applicable in these cases" (J.S. 8a, 10a-11a).

This error alone entitles appellants to a new trial at the very least.

(c) Moreover, the statements published in the Branch's newsletter are not actionable at all under the *Linn* standard. Concededly, at the time their names were listed, the individuals named were nonmembers. And a "scab" is "one who refuses to join a union." Webster's Unabridged New Twentieth Century Dictionary, Second Edition,

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"punitive" damages which total over 200 times the maximum fine which may be assessed on conviction of the parallel statutes which declare abusive language and libel and slander to be crimes. See Virginia Code §§ 18.1-255 & 18.1-256.

p. 1614. Thus, this case involves the accurate use of an epithet and not "defamatory statements published with knowledge of their falsity" (*Linn*, 383 U.S. at 65). Moreover the definition of "scab" printed in the Branch's newsletter (J.S. 2a-3a) was "no more than rhetorical hyperbole"; and, thus, under the *New York Times* standards adopted in *Linn*, provides no basis for the judgment rendered. *Greenbelt Cooperative Publ. Assn.* v. *Bresler*, 398 U.S. 6, 14; see also *Cafeteria Workers* v. *Angelos*, 320 U.S. 293. Indeed, the NLRB, the agency whose experience provided the background for the rule stated in *Linn*, 383 U.S. at 59-61, has held the use of the term "scab," as here defined, to be permitted by statute even if used "erroneously," (*id.* at 60-61; see e.g., *Cambria Clay Prods. Co.*, 106 NLRB 267, 273 enforced in part and remanded in part on other grounds 215 F.2d 48 (C.A. 6).[6] This being so appellants' motion to dismiss should have been granted.

(d) In *Linn* the Court voiced cautious optimism that the limited inroads there made on "state libel remedies" would be sufficient to vindicate the "national labor policy," which is protective of "vehement, caustic, and sometimes unpleasantly sharp attacks * * * provided [they] fall short of a deliberate or reckless untruth;" but noted that it would

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[6] Since the alleged defamation here was published in a newsletter, even assuming *arguendo* that the term "scab" as defined in that publication could be considered a "fighting" word, the judgment below cannot be supported on the basis of *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572; for that case only sanctions state power to redress "face to face words" which "tend to invite an immediate breach of the peace" (*id.* at 572-753). See *Gooding* v. *Wilson*, 405 U.S. 518, 521-523.

reconsider its holding that the states' jurisdiction is not entirely preempted "if experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy." 383 U.S. at 67, 62-63.

We do not urge such reconsideration now. The Court evidently intended such a step to come after the substantive rule of *Linn*—that the *New York Times* standards are applicable in defamation suits growing out of union organizing efforts covered by federal law—had been given the opportunity to operate. But this presupposes, and surely this Court anticipated, that the state courts would respect the *Linn* rule. The court below having failed to do so, reversal on the basis of *Linn* is necessary to vindicate the authority of this Court's precedents.

2. Of course, given the specific holding in *Linn* already discussed, no First Amendment issues need be reached. But the Virginia Supreme Court's statement that the publication here dealt with "only a private matter" (J.S. 8a), and that the First Amendment does not attach is so serious a departure from the decisions of this Court going back 30 years, that it cannot be met with silence. As early as *Senn* v. *Tile Layers Union*, 301 U.S. 468, 478, Mr. Justice Brandeis held for the Court that:

> "• • • Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution • • •."

And in light of the asserted injury to appellees here, it is noteworthy that the very fact publicized in that case was that Senn was not a member of a labor union, that the

union's objective was "to induce him to refrain from exercising" his right not to join a union (*id.* at 77-78), and that the Court recognized "that disclosure of the facts of the labor dispute may be annoying to Senn * * *." *Senn* was followed by *Thornhill* v. *Alabama*, 310 U.S. 88, 102 which expressly held that:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

Whatever inroads subsequent decisions may have made on *Thornhill* in its broadest sweep, that core holding remains the law. See e.g. *International Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284, 294-295; *Teamsters* v. *Newell*, 356 U.S. 341. Moreover, this Court's decisions applying *New York Times* do not rest on a limited reading of the scope of the First Amendment. In *Time Inc.* v. *Hill*, 385 U.S. 374, 388, decided after *Linn*, this Court held:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."

Significantly, the Court quoted and relied on *Thornhill*. 385 U.S. at 388. The *Time Inc.* statement of the scope of the

First Amendment is an echo of what was said in *Thomas* v. *Collins*, 323 U.S. 516, 531, where the purpose of the speech and the meeting involved was to urge working men to join a union:

> "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."

CONCLUSION

For the reasons set out above, as well as those stated in appellants' brief, the decision below should be reversed.

Respectfully submitted,
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August, 1973